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IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC. and
DEWOLFF, BOBERG & ASSOCIATES, INC.
EMPLOYEES' SAVINGS PLAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN COUNCIL OF LIFE INSURERS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The American Council of Life Insurers ("ACLI") is the nation's largest life insurance trade association, representing the interests of 373 legal reserve life insurers operating in the United States. ACLI member companies are the leading providers of financial and retirement security products covering individual and group markets. They provide life, disability income and long-term care insurance, annuities, pension products for 401(k), 403(b) and 457 plans, individual retirement accounts and reinsurance. In the United States, ACLI members account for 93% of the life insurance industry's total assets, 91% of life insurance premiums, and 95% of annuity considerations. Life insurance policies issued by ACLI members include employer-sponsored group disability insurance policies and group life policies. Annuities issued include group annuities issued to employer-sponsored retirement plans. The vast majority of products sold by ACLI members in the group employee benefits market are subject to the requirements of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

Resolution of the questions presented, involving which remedies Congress did and did not authorize in crafting ERISA, could have legal and practical ramifications extending far beyond the parties to this case. Given the

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1. In compliance with Rule 37.6, *amicus curiae* states that no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to preparation or submission of this brief, and no attorney for any party authored this brief in whole or in part. In compliance with Rule 37.3(a), *amicus curiae* states that petitioner and respondents have separately filed with the Clerk their consent to filing of *amicus* briefs.

extensive and vital involvement of ACLI's members in the employee benefits field regulated by ERISA, ACLI is well positioned to address the practical impact on employer-sponsored benefit plans if currently available ERISA remedies are expanded, as petitioner and his supporting *amici* urge, to expose ERISA fiduciaries to claims for monetary damages by plan participants based on losses allegedly suffered by individuals with respect to their benefit plan accounts. Allowing erosion of the statutory limits to ERISA remedies may have significant adverse consequences for ACLI members. These include increased costs for employer-sponsored plans and a concomitant decrease in the number of employers able and willing to sponsor and administer them – thereby decreasing the number of employees participating in those plans.

SUMMARY OF ARGUMENT

Petitioner James LaRue seeks compensatory damages for lost profits he claims his individual 401(k) account would have gained had a putative fiduciary for the plan carried out his investment directions. Because ERISA has a single provision governing all available remedies under the statute, the consequential damages LaRue seeks threaten to expand ERISA's remedies to a host of contexts alien to LaRue's single 401(k) account. Neither of his two avenues for claiming this expanded relief are supported by the language Congress used to describe the limited remedies available under ERISA or this Court's cases construing those remedies.

First, LaRue's belief that ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), allows damage claims based on injuries to his individual 401(k) account is contradicted by this Court's

cases holding that any relief under that section must redress harm to the plan as a whole. LaRue's theory ignores the fact that Congress provided a single remedy provision for all ERISA fiduciaries with language that did not create an exception for 401(k) plans with individual accounts. Moreover, even if the Court were to grant LaRue's proposed remedy, his basis for seeking that relief – the existence of individual accounts – is not a feature of virtually any other type of plan and that remedy should not be extended to plans that do not hold assets in individual accounts.

Second, LaRue invokes the equitable remedies available under ERISA § 502(a)(3) as a basis for seeking his lost profits. The type of consequential damages he seeks is monetary compensation, the classic legal remedy. His surcharge theory is itself a remedy not "typically" available in equity as a whole. Surcharge was instead a form of relief available only in the subset of equity cases addressing the abuse of trust assets.

LaRue's position overlooks the consequences his expansion of remedies under ERISA § 502(a)(3) would cause in other contexts in which fiduciaries provide services to ERISA plans. Congress provided only one remedy provision under ERISA and any monetary remedy crafted for LaRue would arguably extend to other plaintiffs in contexts far removed from his 401(k) plan. In many contexts, an insurer might be deemed to be a fiduciary when it determines whether a participant has a valid claim for benefits. LaRue's theory threatens virtually limitless liability for consequential damages when those insurers apply plan language to deny benefits under a plan. Similarly, despite Congress's stated purpose to limit ERISA's remedies, this expansion of consequential damages proposed by LaRue would have the

natural consequence of discouraging employers from offering plans, thereby further eroding the availability and scope of health, life and other welfare plans on which employee participants have come to rely.

ARGUMENT

The purpose of LaRue's lawsuit is to recover money he claims he might have had if the fiduciaries for his 401(k) pension plan followed his investment directions. He asks the Court to allow him to pursue a claim for "consequential" or "make whole" damages that were the result of an alleged breach of duty he describes in his complaint. *E.g.*, Pet. Br. 11.

To convince the Court that this form of relief should be available under ERISA §§ 502(a)(2) and (3), LaRue wraps his arguments wholly within the confines of the specific 401(k) plan at issue in this case and ignores the effects his arguments could have outside of that limited context. If the Court authorizes consequential damages for an alleged omission in the management of LaRue's individual 401(k) account, it threatens to create a broad judicial expansion of ERISA's remedial scheme respecting all forms of fiduciary activity under all forms of ERISA-regulated pension and non-pension welfare arrangements. This result would be inconsistent with the "carefully integrated" set of enforcement provisions found in 29 U.S.C. § 1132, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), and should be rejected.

I. LaRue's "Bookkeeping" Theory Has No Application Outside Of His 401(k) Plan And, If Adopted, Should Be Explicitly Rejected For Claims Outside That Context.

This Court has determined that any remedy under ERISA § 502(a)(2) – and, in turn, ERISA § 409 – must "inure[] to the benefit of the plan as a whole." *Russell*, 473 U.S. at 139. LaRue believes the Court should set aside this authority for his claims because individual accounts in 401(k) plans are a mere "bookkeeping" fiction and the interests of the individual and the plan are indistinguishable in those plans. *See* Pet. Br. 19.[2]

Far from a mere "bookkeeping" entry, the establishment of individual accounts is the critical feature of many 401(k) plans. Individual account arrangements such as 401(k), thrift, and savings plans are distinctly regulated by ERISA, and precisely because of their separate accounting feature. *E.g.*, 29 U.S.C. § 1107(d)(3) (defining "eligible individual account plan"); 29 U.S.C. § 1104(a)(2) (excusing eligible individual account plans from certain prudence and diversification requirements in connection with qualifying employer securities). In contrast, there are no separate accounts for most traditional pension and welfare benefit plans. The fact that Congress provided a single remedial provision for all plans with no exception for 401(k) plans shows that LaRue's proposed expansion of the remedies available under ERISA § 502(a)(2) – and the related effective rejection of the "plan as a whole" limitation – should be denied.

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2. *See also* Br. for the United States as *Amicus Curiae* 10-11 (relying on nature of defined contribution plans to expand remedies under ERISA § 502(a)(2)); Br. of *Amicus Curiae* AARP 10; Br. of *Amicus Curiae* Air Line Pilots Ass'n, Int'l 8.

Even if the Court were inclined to set aside the well-established law holding that claims under ERISA § 409 must be for relief to the "plan as a whole" and create an exception for 401(k) plans, any such holding should not extend outside the context of 401(k) plans with separate accounts. LaRue's basis for asking the Court to unwind the restrictions Congress placed on ERISA § 502(a)(2) is his focus on the nature of his own 401(k) plan. There is no basis either in LaRue's arguments or Congress's policy to expand his damages theory to the various other species of ERISA plans. To do so would have widespread and unintended consequences for fiduciaries in those plans and the employees who rely on and need the benefits they provide.[3] Even if the Court were to find LaRue's arguments persuasive, it should cabin any holding to the context of 401(k) plans with "bookkeeping" accounts and make clear that LaRue's theory cannot erode the specific limitation on remedies Congress provided for every other species of ERISA plan.

II. LaRue's Claim For Consequential Damages Is Not What Congress Meant By "Equitable" Relief And Allowing That Relief Would Cause A Host Of Consequences Contradicting The Limitation On Remedies Under ERISA § 502(a)(3).

Congress expressly limited the remedies available under ERISA § 502(a)(3) to those that are "equitable." *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993). Congress intended this language to embody a limiting principle in the relief available under that provision. *Id.* The Court has

3. For instance, as described in Section II.B *infra*, expansion of liability under ERISA has the effect of discouraging employers to create employee welfare plans, a consequence directly contradicting Congress's intent.

therefore instructed that "equitable relief" under ERISA § 502(a)(3) refers "to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original).

LaRue now asks the Court to abandon this limiting principle and re-write ERISA to allow claims for the type of consequential damages that he allegedly suffered in relation to his plan fiduciary's purported failure to carry out his investment instructions. This request for "make whole" damages was not typically available in equity and is not the type of remedy Congress provided under ERISA § 502(a)(3).

Moreover, because ERISA contains a single remedy provision, allowing consequential damages under ERISA could affect the broader species of benefits provided for employees in the multitude of plans governed by ERISA. Any expansion of these remedies threatens to creep into claims asserted under these different types of benefit plans. A number of direct consequences flow from LaRue's proposed broadening of the remedies available under 502(a)(3), including the potential availability of claims for consequential damages as a remedy for a fiduciary's denial of benefits under welfare benefit plans and a reduction in the availability of employer-sponsored plans in direct contravention of Congress's intent. Because these consequences would violate the language of ERISA, the Court's caselaw and Congress's goals for ERISA, the Court should reject LaRue's proposed expansion of the remedies available under ERISA § 502(a)(3).

A. LaRue's claim for consequential "lost profit" damages is in no sense the type of relief that was "typically" available in equity.

LaRue invokes ERISA § 502(a)(3) as a mechanism for obtaining "make whole" or "consequential" relief. He therefore characterizes his relief as an award that would make his 401(k) account the same as it would have been "but for the breach of fiduciary duty." Pet. Br. 11. LaRue asks for these consequential damages through what he deems an equitable "surcharge," while some of his supporting *amici* bluntly ask the Court to award damages without any rhetoric sounding in equity.

However, the Court has unequivocally held that remedies under ERISA § 502(a)(3) are limited to those that were "*typically*" available in equity. *Mertens*, 508 U.S. at 256 (emphasis in original). LaRue's hyper-technical "surcharge" theory is a rhetorical device with no support in the Court's reading of ERISA § 502(a)(3). The Court has always recognized that blowing the dust off of the equity treatises would almost always allow plaintiffs to find an equitable patina with which to gloss their claims for legal damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). The question is not whether the participant's claim bears some resemblance to an equitable remedy found somewhere in the annals of equity jurisprudence, but whether the remedy is what Congress would understand to be among those remedies "typically" available in equity. Monetary compensation for consequential injuries (here, hypothetical lost profits) has long been understood as a classic legal remedy. *E.g.*, *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854). Common sense pierces through LaRue's invocations to equity and shows that what he seeks is a legal remedy.

Nor is "surcharge" a remedy that was "typically" available in equity. *Mertens*, 508 U.S. at 256. On its face, the surcharge theory only applies in the context of *trust cases* and not all claims in equity. LaRue's Brief to this Court contains a section heading that makes this point crystal clear: "Surcharge is not properly viewed as a 'legal remedy' that was awarded by equity courts *in trust cases*." Pet. Br. 35 (emphasis added). Because this surcharge remedy was itself limited to one subspecies of trust cases, it does not apply broadly to all claims in equity and was not "typically" available in equity cases.

Many ERISA plans do not even incorporate the trust concept on which LaRue's theory rests. Although ERISA generally requires that all plans have one or more trustees, *see* 29 U.S.C. § 1103(a), it also explicitly exempts insurance policies and the assets of an insurance company from that trustee requirement. *See* 29 U.S.C. § 1103(b)(1) & (2) (exempting from the trust requirement "any assets of a plan which consist of insurance contracts or policies issued by an insurance company" and "any assets of such an insurance company or any assets of a plan which are held by such an insurance company"); *see generally Brown v. Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1561-62 (11th Cir. 1990) (an "insurance policy . . . is not an asset held in trust for the beneficiaries of the plan because the trust requirements of section 1103(a) do not apply"; an "insurance company pays out to beneficiaries from its own assets rather than the assets of a trust").

ERISA therefore expressly provides that in some circumstances insurers might not hold assets in trust even when they otherwise serve as a fiduciary for a plan and exercise discretion under the plan. *See* 29 U.S.C. § 1103(b)(1)

& (2). For welfare benefit arrangements structured in this manner, the benefits are funded instead through the issuance of a policy for life, disability, health or other form of ERISA-regulated welfare benefit. The benefits provided under such plans come from the private funds of the insurance company. Before being paid to the participants, these sums are held in the insurer's state-regulated general accounts. LaRue's surcharge theory derives solely from the trust context, which bears no relation whatsoever to the many non-trusted ERISA plans provided by life insurers. *See* Pet. Br. 34 (saying that surcharge provides remedy against "a trustee, for breach of trust") (internal quotation marks and citation omitted).[4]

4. LaRue's surcharge theory seeks to impose this trust law remedy on all fiduciaries without accounting for non-trusted plans. The Court's cases already make clear that trust law remedies should not be expanded into ERISA *carte blanche* to defendants who are not serving as trustees in relation to the assets at issue. *See Varity Corp. v. Howe*, 516 U.S. 491, 496-97 (1996) (ERISA's "fiduciary duties draw much of their content from the common law of trusts," but "that trust law does not tell the entire story"). Indeed, the distinction between funds held in trust and those not held in trust was the critical fact distinguishing the availability of a remedy in the Court's two most recent cases under ERISA § 502(a)(3), *Great-West* and *Sereboff v. Mid Atlantic Medical Servs., Inc.*,126 S.Ct. 1869 (2006). When serving as fiduciaries of non-trusted plans, life insurers by definition exercise the discretion given to them by those plans and by ERISA. They are not, however, automatically deemed to be (and do not act as) trustees of plan assets. Trust law remedies simply have no application to these insurance company funded arrangements. *See Wachtel v. Health Net, Inc.*, 482 F.3d 225, 227 (3d Cir. 2007) ("When a plan beneficiary submits a claim, the [insurer] will process the claim and, if appropriate, pay the beneficiary from the [insurer]'s own funds"). In other words, LaRue's theory of damages wrongfully asks this Court to make available a trust law remedy under ERISA's enforcement provision, which applies to all ERISA fiduciaries regardless of whether they are trustees or are simply fiduciaries exercising discretion over non-trusted assets.

Several *amici* suggest that not allowing this trust remedy in the instant case would leave those injured by a fiduciary's breach without any remedy in derogation of ERISA's remedial purpose. *E.g.*, Br. for the United States as *Amicus Curiae* 9-10.[5] Of course, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 261-621 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-647 (1990), and citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 54, 56 (1987)).

LaRue in fact had a number of remedies available under ERISA, but chose to forgo them in favor of his broader lost profits theory. Notably, ERISA § 502(a)(1)(B) allows a participant in LaRue's position to seek declaratory relief in order to enforce or clarify his rights under the plan. LaRue could well have sought a declaration that his interest in the plan should reflect the investment directions he claims he ordered his fiduciary to make.

Indeed, even if ERISA § 502(a)(1)(B) did not provide relief, ERISA § 502(a)(3) would itself have provided LaRue

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5. Indeed, the worst of the horribles suggested by *amici* – the naked theft of plan assets – is itself criminal. *See* 18 U.S.C. § 664 (making it a federal offense to convert ERISA plan assets). A civil remedy against the perpetration of such thefts might be available under the Racketeer Influenced and Corrupt Organizations Act, ("RICO"). *See* 18 U.S.C. § 1961 (listing RICO predicate acts and including violation of 18 U.S.C. 664); 18 U.S.C. § 1964 (creating right to civil enforcement under RICO).

the remedy of an injunction for the purported breach of fiduciary duty that occurred in this case. ERISA § 502(a)(3) allows a participant to seek an injunction to require a fiduciary to carry out his duties, including acting on an investment direction under a 401(k) plan. *See* 29 U.S.C. § 1132(a)(3)(A) (allowing suit "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan"). LaRue did not invoke this remedy, but instead waited to exercise his ERISA rights until he incurred the consequential damages that he now seeks to recover.[6]

These examples are only some of the available remedies under ERISA that already adequately protect his interests under the limited facts of this case. Obviously, a galaxy of other examples exist in the broader context of defined contribution plans and a universe of other remedies exist when the view is expanded to include the management of all ERISA pension and welfare plans.

Out of this universe of remedies available to LaRue, Congress barred LaRue from pursuing only the lost profits he now believes maximizes the potential financial recovery in this lawsuit. The maximum monetary recovery may not

6. Allowing damages in light of LaRue's failure to invoke the available injunctive relief puts LaRue squarely in the proverbial catbird seat. He would benefit directly if his investment direction proved unwise, and the fiduciary's failure to carry out the command protected him from an adverse market downturn. If the fiduciary's failure did result in injury because his investment decision proved wise, he would then have the option to sue to recover his damages. He could not lose in either position. Granting LaRue relief in this case would encourage other plan participants to do the same. Denying the relief LaRue seeks would ensure that a plan participant who claims his investment directions were not followed will take prompt action to compel that his directions are followed.

always be the optimal policy choice, and the balance of available remedies and the consideration of the societal costs posed by those remedies is a uniquely legislative function. Congress engaged in this balance in 1974 when it passed ERISA after a "decade of congressional study of the Nation's private employee benefit system." *Mertens*, 508 U.S. at 251. Congress has not seen fit to grant plaintiffs the right to consequential damages in the intervening decades or in the years since *Mertens* first construed ERISA § 502(a)(3). There is no basis to infer such a right at this late date, and no basis retroactively to expose ERISA fiduciaries to claims for consequential damages. *Mertens*, 473 U.S. at 146-147 (the Court is "unwilling[] to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly'") (quoting *Russell*, 473 U.S. at 146-47).

B. LaRue's proposed expansion of 502(a)(3) has a host of negative consequences that Congress did not intend in enacting ERISA.

While LaRue's argument arises in the context of his 401(k) plans (which are themselves a subspecies of ERISA defined contribution plans), his proposed remedy threatens a broadening of all remedies available under ERISA § 502(a)(3), thereby contravening the protection Congress intended for ERISA fiduciaries and the balance it struck in enacting ERISA § 502(a)(3). While a host of effects could be created by this expansion of those remedies, at a minimum LaRue's theory: (1) threatens to allow consequential damages for the denial of benefits in welfare plans; and (2) discourages the creation of plans because of the virtually limitless exposure of consequential damages claims.

First, LaRue's theory threatens to expand fiduciary liability into the context of benefits claims administration. The life insurers who are members of ACLI provide life, disability income and health insurance as part of a variety of employer-sponsored plans. They are therefore called upon to carry out a number of functions that may be deemed to involve fiduciary duties under ERISA, including determining whether individual participants are entitled to benefits under those ERISA welfare plans. *Mertens*, 508 U.S. at 251-52 (identifying "the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest" as fiduciary functions under ERISA) (quoting *Russell*, 473 U.S. at 142-143); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004).

When viewed outside the limited context of LaRue's 401(k) plan, LaRue's consequential damages theory threatens to revamp fiduciary relationships in a way that is inconsistent with the limited remedies Congress intended under ERISA § 502(a)(3). Nowhere is the tension created by LaRue's consequential damages theory more acute then when viewed in the context of benefits decisions that insurers are asked to make on a daily basis. In many contexts, an insurer might be deemed to be a fiduciary when it determines whether a participant has a valid claim for benefits. *See Davila*, 542 U.S. at 220 ("the ultimate decisionmaker in a plan regarding an award of benefits must be a fiduciary and must be acting as a fiduciary when determining a participant's or beneficiary's claim"); *see also* 29 U.S.C. § 1104(a)(1).

ERISA explicitly provides a right to sue plans for the recovery of benefits owed to participants. *See* ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This provision

authorizes a civil action "by a participant or beneficiary" to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of plan, or to clarify his rights to future benefits under the terms of the plan." As this Court has explained, "[t]his provision is relatively straightforward. . . . If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits." *Davila*, 542 U.S at 210.

This remedy is itself limited. By its terms, the only monetary remedy available under section 502(a)(1)(B) is the benefits due "under the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989). Because ERISA § 502(a)(1)(B) claims are limited to the actual benefits owed by the plan and not all consequential injuries, an enterprising plaintiff wanting to expand its recovery would naturally attempt to rely on LaRue's consequential damages theory to go beyond the remedies Congress provided under ERISA § 502(a)(1)(B).

The Court has previously warned against conflating claims for benefits with claims for breach of fiduciary duty. *See Varity Corp. v. Howe*, 516 U.S. 491, 512 (1996); *see also Davila*, 542 U.S. at 219 ("a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan"). Instead, the Court has explained that claims based on the denial of benefits should be asserted under ERISA § 502(a)(1)(B). The *Varity* Court ruled that ERISA § 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims," while ERISA § 502(a)(3), in contrast, is a "'catchall'" provision that "act[s] as a safety net, offering appropriate

equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy."[7]

Because the denial of benefits can arguably be a breach of fiduciary duty in some circumstances, LaRue's consequential damage theory threatens to reopen the availability of damages for the denial of benefits and serve as an end-run to the limitations imposed by ERISA § 502(a)(1)(B). Thus, LaRue's expansion of remedies under 502(a)(3) could expose life insurers (and all persons or entities making claims decisions) to an entirely new species of claims for damages despite the Court's earlier rulings. Although LaRue ostensibly desires to limit his theory only to 401(k) cases, Congress gave ERISA a single remedy provision and whatever relief LaRue might be afforded could be deemed available to all ERISA participants regardless of the nature of the plan. *See* 29 U.S.C. § 1132. Because it is clear that participants in welfare benefit plans do not have the right to recover the type of consequential damages LaRue seeks in this case, the Court should reject LaRue's backdoor attempt to change the remedies available in all ERISA plans based on his status as a participant in a 401(k) plan.

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7. Courts of Appeal addressing the issue have universally come to the same conclusion. *E.g.*, *LaRocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (collecting authority) ("federal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section 502(a)(1), there is an adequate remedy under the plan which bars a further remedy under Section (a)(3)"); *see also Tolson v. Avondale Indus.*, 141 F.3d 604, 610 (5th Cir. 1998); *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 933 (8th Cir. 2003); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615 (6th Cir. 1998); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475 (9th Cir. 1997).

Second, LaRue's proposed damages would inevitably discourage both employers and third parties from providing fiduciary services to ERISA plans. Congress enacted ERISA in order to encourage the creation of benefit plans for employees. *Pilot Life*, 481 U.S. at 54 (ERISA "represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans"); *see also Mertens*, 508 U.S. at 262-63. LaRue's consequential damages theory would have the opposite effect. Faced with expanded (and unanticipated) liability, both employers and third parties would inevitably withdraw from serving as fiduciaries to employee welfare plans. Third-party fiduciaries such as life insurers would necessarily charge more for their services, which in turn would make their services less attractive to employers. Employers would either absorb these costs themselves or not offer plans to their employees at all. These additional costs would further erode the availability of health and life insurance benefits. Whether this effect is acceptable as a policy matter is a uniquely legislative decision that should be left to Congress. *See id.* ("Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. . . . We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.").[8]

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8. Indeed, premiums for fiduciary insurance continue to rise even without the expanded liability sought by LaRue. *E.g.*, Towers Perrin, *Navigating Today's Fiduciary Concerns, Executive Summary of 2003 Fiduciary Liability Survey Report* at 10, *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2004/200407/Navigating_Concerns.pdf (last viewed Sept. 11, 2007).

Moreover, those who presently serve as fiduciaries accepted their duties (and have insured themselves) based on the present scope of fiduciary liability available under ERISA as set out in the Court's ERISA caselaw. None of the Court's previous cases has allowed an ERISA § 502(a)(3) claim for compensatory or consequential damages against an ERISA fiduciary, much less life insurers serving as limited fiduciaries for all forms of employee welfare benefit plans. These fiduciaries accepted their responsibilities under that existing law. If ERISA remedies are expanded to include consequential damages, fiduciaries will have difficulty obtaining insurance coverage for the retroactive exposure that would spring to life, as they obtained coverage under the settled existing law that does not allow for consequential damages under ERISA. Plaintiffs asserting claims based on events that predate any expansion of remedies would no doubt claim entitlement to that extension of ERISA § 502(a)(3)'s remedies even though fiduciaries had no reason to expect that they would be exposed to those consequential damages. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1388 (10th Cir. 1990) ("Once the Supreme Court has interpreted a statute, that construction becomes a part of the statute, and the Court's interpretation applies retroactively to pending cases"); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("Judicial decisions operate retroactively because we generally regard them as an expression of pre-existing law").

Because of these concerns, existing plans would face the prospect of losing the professional services provided by life insurers and others who presently act as fiduciaries due to a significant and wholly unanticipated expansion of liability beyond the terms of the statute and current caselaw.

CONCLUSION

By wrapping his claim for relief within the narrow confines of 401(k) plans, LaRue's argument that the Court should expand the type of individual relief provided by ERISA ignores the broader effects his consequential damages theory could impose on welfare benefit plans and other benefit arrangements. Placing that remedy in context, it might create rights for recovery against ACLI's members that Congress did not intend and that this Court has previously foreclosed. The Court should reject LaRue's proposed relief and affirm the decision of the Fourth Circuit.

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